

# BARGAINING UNIT DETERMINATION

## GUIDANCE FOR SFA MANAGERS

### INTRODUCTION

This guidance has been assembled by the Labor Relations Group to assist SFA Managers in determining whether positions at GS-13, 14 or 15 should be excluded from the bargaining unit. The majority of the information on bargaining unit status of specific categories was obtained from the Federal Labor Relations Authority's Hearing Officers Guide for Representational Cases.

Article 1 of the collective bargaining agreement between the Department of Education and the National Council of Department of Education Locals, Council 252, American Federation of Government Employees (see pages 2-3), explains that, with several exceptions, the bargaining unit is comprised of all professional and nonprofessional employees of the Department of Education. The Bargaining Unit Status Recommendation Checksheet, at pages 4-5, is to be completed by each supervisor when a decision is made to exclude a position from the bargaining unit. As you can see on the checklist, the primary exclusion categories that apply to the GS-13, 14 and 15 employees are as follows:

**Management Officials** - Detailed information on management officials is found at pages 14-16.

**Supervisors** - Specific information on supervisory status under the labor relations statute is at pages 16-20.

**Team leaders** may or may not be excluded based on their supervisory responsibilities. Guidance from the Office of Personnel Management on team leader positions is at pages 21-25.

**Confidential Employee** - Further guidance on determining confidential employee status is at pages 9-11.

There are several other categories of employees excluded from the bargaining unit. Information on **employees engaged in personnel work** can be found at pages 11-1. Employees primarily engaged in **investigation or audit functions** relating to the work of ED employees are excluded from the bargaining unit. Information on audit positions is at pages 7-9. Certain categories of employees are excluded based on their appointment status, not their duties. Employees who are on Schedule C appointments, experts, consultants, employees on intermittent appointments, and employees on temporary appointments of 90 days or less cannot be included in the bargaining unit.

Please feel free to contact the Labor Relations Group if you need further assistance in determining the appropriate status of employees in SFA.

## **ARTICLE 1**

### **PARTIES TO THE AGREEMENT AND DEFINITION OF UNIT**

#### **Section 1.01**

**This Agreement is made and entered into between the United States Department of Education, hereinafter referred to as the Employer, the Department, or Management, and the American Federation of Government Employees, AFL-CIO through its agent, National Council of Education Locals No. 252, hereinafter referred to as the Union or the Council, and collectively known as the Parties.**

#### **Section 1.02**

**The Federal Labor Relations Authority on July 22, 1981, in Cases Nos. 3-RO-71 and 3-RO-72, certified the Union as exclusive representative for a bargaining unit of all professional and nonprofessional employees of the Department, but excluding the following as set forth therein:**

- (a) Management officials and supervisors;**
- (b) Confidential employees;**
- (c) Employees engaged in personnel work in other than a purely clerical capacity;**
- (d) An employee engaged in administering the Federal Labor-Management Relations Program;**
- (e) Employees engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security;**
- (f) Employees primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department;**
- (g) Employees of the Office of Inspector General; [The Office of Inspector General is excluded, by agreement, because of the existing organization of its functional responsibilities.]**
- (h) Experts and consultants;**
- (i) Intermittent employees;**
- (j) Employees hired under the summer employment program and employees under student appointments (except those in the Cooperative Education Program);**
- (k) Faculty advisers;**
- (l) Employees appointed under fellowship programs;**
- (m) Schedule C employees;**

- (n) Members and staff of independent agencies, boards, commissions and councils for which the Department provides administrative services; and**
- (o) Employees on temporary appointments of ninety (90) days or less.**

## BARGAINING UNIT STATUS RECOMMENDATION CHECKSHEET

To aid the Office of Management in making an accurate determination of the bargaining unit status of the subject position, we are asking that you **complete this checksheet when recommending that a position be excluded from the bargaining unit**. The Office of Management (Human Resources Group in consultation with the Labor Relations Group) will make the official bargaining unit status determination.

The Federal Service Labor-Management Relations Statute and the Education Department Collective Bargaining Agreement identify the types of employees who are excluded from the bargaining unit.

The criteria for exclusion, in abbreviated form, are listed below. If you believe that the subject position meets any of the exclusion criteria, please place an "X" in the space(s) provided to the left of the criteria.

POSITION TITLE/SERIES/GRADE: \_\_\_\_\_

POSITION LOCATION/INCUMBENT: \_\_\_\_\_

### \_\_\_\_\_ Management Official

A management official is an employee who formulates, determines, or influences the policies of the agency. Policy is defined as the general principles, plans or courses of action for an agency. An employee whose actions assist in implementing, rather than shaping policies is not likely to be a management official. Similarly, an employee who is an expert or professional rendering resource information or recommendations as to policies would not be a management official; the duties and responsibilities must extend to active participation in the ultimate determination of what the policy will be. Whether a person's work is or is not subject to higher level review or approval is a factor in making this determination. If you select this exclusion, please attach a brief statement listing specific examples of policy formulation, determination or influencing duties of the position.

### \_\_\_\_\_ Supervisor

A supervisor is an employee having the authority to hire, direct, assign, promote, reward, transfer, furlough, layoff, discipline or remove employees, to resolve grievances, or effectively recommend such action if the exercise of the authority is not merely routine or clerical in nature and requires the consistent exercise of independent judgment. Exercise of one of these indicia, provided that it features the

consistent use of independent judgement, will be sufficient for exclusion. It is not necessary for an employee to be in a position which meets the position classification requirements to be titled "Supervisory" in order to be excluded as a supervisor. A team leader who meets one or more of these factors would be excluded from the bargaining unit.

An employee who supervises only one employee falls in this category.

An employee who evaluates employee performance as a rating official falls in this category.

\_\_\_\_\_ Confidential Employee (Non-Schedule C)

A confidential employee is one who works in a confidential relationship with the supervisor AND the supervisor has a significant role in formulating or effectuating labor relations policies. The mere typing of grievance decisions, or access to personnel or labor relations files, will normally not be enough to warrant exclusion.

\_\_\_\_\_ Other      Please specify: \_\_\_\_\_

Several other categories of employees are excluded including: employees in the Office of Inspector General; employees engaged in personnel work in other than a purely clerical capacity; employees primarily engaged in investigation or audit functions relating to the work of ED employees; employees on Schedule C, expert, consultant and intermittent appointments; most employees under summer or student appointments, or hired under fellowship programs; employees on temporary appointments of 90 days or less; and employees of independent agencies, boards, commissions or councils for which Ed provides administrative services.

\_\_\_\_\_  
Signature of Official  
Making Recommendation

\_\_\_\_\_  
Title/Date

**NOTE: THIS CHECKLIST, THE POSITION DESCRIPTION, AND PERFORMANCE APPRAISAL PLAN MUST ALL ACCURATELY REFLECT THE DUTIES AND RESPONSIBILITIES ACTUALLY PERFORMED BY THE EMPLOYEE.**

*Excerpts from*  
**Federal Labor Relations Authority, Office of the General Counsel**  
**Representation Proceedings Case Handling Manual**

***Employee Categories***  
***Sections 51 through 64***

**51    *General considerations***

Definitions for terms such as exclusive representative, employee, professional, supervisor, labor organization are found in section 7103 of the Statute. In addition, section 7112 prohibits the inclusion in any bargaining unit of specific categories of employees (e.g., confidential, engaged in federal personnel work).

The Authority alone is empowered to determine bargaining unit eligibility. See *U.S. Small Business Administration*, 32 FLRA 847 (1988). The Authority makes such determinations based on testimony as to an employee's actual duties at the time of the hearing, rather than on duties that may exist in the future. See *Department of Housing and Urban Development*, Washington, D.C., 35 FLRA 1249, 1256-1257 (1990). Evidence such as a position description for a position may be useful in making unit determinations, but is not controlling. The hearing must address if the incumbent is performing all work listed in the position description, or is performing other work, not listed in the position description. Some cases involve special circumstances which must be addressed in the hearing.

***Employee recently placed in position:*** At times, a position that is the subject of the hearing will have been filled recently. Where an employee has recently been placed in a position, duties are considered to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that he or she will be performing the duties; (2) the nature of the job clearly requires those duties, and (3) the employee is not performing those duties at the time of the hearing solely because of lack of experience on the job. The Authority does not consider duties to have been actually assigned where: (1) the assignment of duties is speculative, because the nature of the job may change or the nature of the job does not require such duties; or (2) although duties may be included in a written position description, it is not clear that the duties actually will be assigned to the employee or that the employee has been informed that he or she will perform these duties. See *Department of the Interior, Bureau of Reclamation, Yuma, Arizona*, 37 FLRA 239 (1990).

***Vacant positions:*** Generally, eligibility determinations will not be made for vacant positions. See *Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado*, 6 FLRA 52 (1981). However, where the clarification of a position will decide if an individual has access to the negotiated grievance procedure, it is appropriate to clarify the position even if it is vacant at the time of the hearing. See *HQ, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina* 34 FLRA 21 (1990).

The following questions pertain to special unit determination situations:

- 1) Where an employee has recently been placed in the position in question:
  - a) Obtain a copy of the vacancy announcement, position description and performance standards for the position.
  - b) What duties is the employee currently performing?
  - c) What has the newly hired employee been told regarding his or her duties?
  - d) What types of training has this new employee attended, or what type of training is this new employee scheduled to attend?
  - e) Develop a record, if possible, of the duties of the predecessor in the position.
  - f) Are there other similarly- situated employees and what do they do or have they done?

References:

*Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371 (1990).*

*Veterans Administration Medical Center, Prescott, Arizona, 29 FLRA 1313 (1987).*

### **53 Internal audit/ investigation function**

Section 7112(b)(7) excludes from all bargaining units:

any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

Employees engaged in investigation or audit functions are excluded from bargaining units under section 7112(b)(7) on the basis that inclusion of individuals performing these functions would create a conflict with bargaining unit status. The nature of the investigation/audit and what the investigation/audit might uncover as it pertains to unit employees is controlling as to this exclusion. For example, individuals who audit agency programs and/or contracts and whose audits may uncover the failure of employees to comply with programs, or employee fraud waste and abuse, are excluded pursuant to section 7112(b)(7). See *Small Business Administration*, 34 FLRA 392, 400 - 402 (1990). Thus, auditors or investigators do not have to be directly investigating unit employees for this exclusion to be considered. Also, the fact that the audits or investigations do not regularly find these violations is not dispositive.

Relevant matters to cover at a hearing include:

- 1) The mission of the agency component in which the disputed position(s) are located.
- 2) Typically, agency Regulations or directives exist, which describe the work performed by and the authorities possessed by these investigators or auditors. Copies of these Regulations or directives should be obtained.
- 3) Position descriptions and performance standards for the position should be obtained.
  - a) Describe the specific job functions of the employees
  - b) Describe the type(s) of investigatory functions they perform
  - c) Describe the type(s) of audit functions they perform
  - d) Discuss on whose behalf in the agency are these investigations or audits being performed.
- 4) What matters are investigated or audited?
  - a) Describe the investigations of unit employees that the employees have performed.
  - b) Describe the claims, such as travel vouchers, that they have audited, which were filed by employees.
  - c) Describe the agency programs that the employees have audited.
  - d) What percentage of the time do they spend on these investigations or audits?
- 5) Who directs the subject investigations or audits/to whom do the subject employees report?
  - a) The investigative or audit process should be described in detail.
  - b) The review process of the investigation-or audit should be described.
  - c) How might these investigations or audits affect bargaining unit employees?
  - d) Have any employees been disciplined or removed, as a result of the investigations or audits performed by these individuals.
  - e) Have procedures or programs been changed to enhance or promote internal security, as a result of an investigation or audit by one of these employees?



## References:

*Department of Labor, Office of the Inspector General, Region I, Boston*, 7 FLRA 834 (1982).

*U.S. Department of the Navy, Navy Audit Service, Southeast Region*, 46 FLRA 512 (1992).

## 55 Confidential employee

“Confidential employee” is defined in Section 7103(a)(13) of the Statute as:

. . . an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

A unit is not appropriate if it includes confidential employees [section 7112(b)(3)].

An employee is a “confidential” if (1) there is evidence of a confidential working relationship between an employee and a supervisor or manager and (2) the supervisor or manager is significantly involved in labor-management relations. This two-part, labor-nexus test is used to examine the nature of an employee’s confidential working relationship. *See U. S. Department of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371 (1990). Both factors must be present for an employee to be considered “confidential” within the meaning of section 7103(a)(13), *See U.S. Army Plant Representative Office, Mesa, Arizona*, 35 FLRA 181 (1990). Thus, determination of confidential status is dependent upon the work performed by the individual with whom the employee works. This individual may be the employee's supervisor or may be another manager.

An individual who actually formulates or effectuates management policies in the field of labor-management relations is considered a confidential employee. *U.S. Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1255-57 (1990). Other individuals who are privy to labor-management relations policies as they are developed are excluded on the basis of confidential status, because their inclusion in a bargaining unit would create a conflict of interest between the employee’s work duties and unit membership.

Therefore, at a hearing it is necessary to explore not only the work of the employee whose status as a confidential is in dispute, but also the work of the person with whom or for whom the disputed employee works. Also at a hearing it is important to focus on the stage at which this confidential employee is involved in the process by which management labor-relations policies are developed (i.e., is the employee present during the development of the policies, or does the employee’s involvement occur after the management policy has been developed and decided). An employee's mere access to labor relations material does not justify unit exclusion.

The following items are necessary to determine the confidential status of an employee:

- 1) Documentation, such as organizational charts, of the Activity, locating not only where the alleged confidential employee is found on the chart, but also the individual(s) for whom the employee works in a confidential capacity.
- 2) Testimony and documentation as to the actual duties of the employee, focusing especially upon the employee's assigned tasks that result in the employee being involved in labor-management relations.
  - a) Description of the employee's daily routine (obtain a copy of the position description and performance standards).
  - b) Describe the employee's participation and attendance at management meetings where discussions ensue concerning labor relations issues, contract negotiations strategies and proposals and personnel policies. Determine the involvement of the employee at these meetings: note taker, etc.
  - c) Describe the employee's participation in the preparation of management's responses for grievances, unfair labor practices, negotiation demands, proposed disciplinary actions and other personnel actions that may result in the filing of grievances under the negotiated grievance procedure.
  - d) Describe the nature and extent of the employee's access to confidential information concerning other employees and management labor relations policies and plans.
  - e) Describe the types of advice or assistance the employee gives to other employees or supervisors or managers in labor relations/personnel matters.
  - f) What is the percentage of time employee spends in above activities?
- 3) Testimony and documentation regarding the individual who formulates or effectuates management policies in the field of labor-management relations.
  - a) Obtain a copy of the position description and performance standards.
  - b) Describe this person's responsibility as to establishing, interpreting, or implementing personnel labor relations policies.
  - c) Describe the person's actual participation in contract negotiations and development of contract proposals.
  - d) Describe this person's participation in handling grievances/ arbitration and disciplinary and adverse actions, and obtain examples of grievance decisions, replies to proposed disciplinary actions, etc.

- e) What is the nature of this person's participation of this individual in labor-union meetings?
  - f) Describe this person's participation and involvement in Equal Employment Opportunity Complaints, Merit Systems Protection Board Proceedings, awards, and promotions.
  - g) What is the nature of this person's attendance and participation at Agency meetings at which sensitive labor relations matters are discussed and deliberated?
  - h) What is the extent of this person's participation in the formulation and development of the Agency's labor relations policies?
  - i) Describe the involvement of the alleged confidential employee's involvement in above matters, obtaining documents when possible.
- 4) Obtain specifics from the Activity concerning the potential disruption to or conflict within the Agency's operations which will result if the alleged confidential employees are included in the bargaining unit.

References:

*Department of Interior, Bureau of Reclamation, Yuma, Arizona*, 37 FLRA 239 (1990).

*Tick Eradication Program, Veterinary Services, Animal and Plant Inspection Service, United States Department of Agriculture*, 15 FLRA 250 (1984).

## 56 Employees engaged in personnel work

Section 7112(b)(3) of the Statute excludes from appropriate units "an employee engaged in personnel work in other than a purely clerical capacity." Employees are considered "personnelists" under section 7112(b)(3) if their inclusion in the unit would result in a conflict of interest between work duties and unit membership.

**Nature of personnel work:** A position is excluded under section 7112(b)(3) of the Statute when: (1) the character and extent of involvement of the incumbent in personnel work is more than clerical in nature; and (2) the duties of the position in question are performed in a non-routine manner or are of such a nature as to create a conflict of interest between the incumbent's union affiliation and job duties. *See Department of the Treasury, Internal Revenue Service, Washington, D. C and Internal Revenue Service, Cincinnati District, Cincinnati, Ohio*, 36 FLRA 138, 144 (1990).

**Exercise of independent judgment and discretion:** Employees who exercise independent judgment and discretion in initiating personnel actions or making recommendations to management on personnel actions are engaged in federal personnel work in other than a purely clerical capacity. *See U.S. Department of*

*Housing and Urban Development*, 34 FLRA 207, 214 (1990). In contrast, individuals whose duties only require the recording and processing of completed personnel actions, maintenance of personnel files, or the screening of personnel actions for technical sufficiency, are not subject to the exclusion in section 7112(b)(3) because their involvement in personnel work is in a clerical capacity. *See U.S. Naval Station, Panama*, 7 FLRA 489 (1981).

**Personnel work must pertain to employees:** Employees who are involved in recruiting efforts for the military or who process military personnel information are not engaged in “federal personnel work”, within the meaning of section 7112(b)(3) of the Statute. *See U.S. Army District Recruiting Command - Philadelphia*, 12 FLRA 409 (1983); *934th Tactical Airlift Group, Minneapolis-St. Paul International Airport, Minneapolis, Minnesota*, 13 FLRA 549, 561, 562 (1983).

The following information is needed to determine whether an employee is engaged in personnel work in other than a purely clerical capacity:

- 1) Documentation, such as organizational charts, of the activity, locating where the alleged federal personnelist is found on the chart.
- 2) Evidence and documentation as to the actual duties of the employee, focusing especially upon the employee's assigned tasks that result in the employee being involved in federal personnel work. Obtain copies of the employee's position description and performance standards.
- 3) Describe the nature of the involvement by this person in the preparation and processing of personnel actions including hiring, adverse actions, promotions, pay increases, transfers, demotions, awards, performance appraisals, and training. The testimony of the employee should be focused on the extent of independent judgment exercised by the employee in the performance of these duties.
  - a) What does this employee do to initiate these forms? How independently is this person functioning in this process?
  - b) What does the employee do in the review of these forms? Is this person reviewing these forms prior to their issuance, for accuracy?
  - c) What is this employee's involvement in the filing or distribution of completed forms.
- 4) Describe the nature of the employee's involvement in the creation of personnel policies or activity policies.
  - a) Copies of any such policies are helpful, as is a description of the individual's participation in their formulation.
- 5) Describe the records and information about unit employees to which the employee has access and for what purpose?
- 6) Describe how the employee advises supervisors and managers in personnel matters, such as disciplinary matters, responding to grievances, etc.

- a) Copies of personnel actions, grievance responses, or other documents which reflect this involvement are helpful, as is a description of the employee's participation in their formulation.
  - b) Copies of any personnel or staffing studies conducted by the employees should be entered in the record, along with testimony of the employee's participation in the studies.
- 7) Does the individual counsel employees on personnel matters, such as retirement benefits, insurance benefits, etc.
  - a) Copies of documents which reflect this assistance to employees are helpful, as is a description of the individual's work in these matters.
  - b) The independent judgment exercised by the employee in this counseling should be fully explored and explained on the record.
- 8) What is this employee's involvement in the development or implementation of Equal Employment Opportunity programs at the activity?
  - a) Describe any EEO studies conducted by the employee in these matters, studies in which contain recommendations as to the attainment of EEO goals are of particular importance.
  - b) Describe this employee's participation in the establishment of EEO hiring, educational or promotion goals for the activity?
  - c) What is the extent of this person's involvement in the EEO counseling process?
  - d) What is the extent of this person's involvement in the EEO investigative process?
  - e) What is the extent of this person's involvement in the EEO adjudicatory or settlement process?

References:

*Headquarters, Fort Sam Houston, Fort Sam Houston, Texas, 5 FLRA 339 (1981).*

*Veterans Administration Medical Center, Prescott, Arizona, 29 FLRA 1313 (1987).*

*U.S. Department of the Army, Headquarters, First Airborne Division, Fort Campbell, Kentucky, 36 FLRA 598 (1990).*

“Management official” is defined in section 7103(a)(11) of the Statute as:

. . . an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policy of the agency.

A unit is not appropriate if it includes management officials [section 7112(b)(1)].

The criteria to be applied in determining if a position meets the statutory definition of “management official” is whether the person in the position (1) creates, establishes or prescribes general principles, plans or courses of action for an agency; (2) decides upon or settles upon general principles, plans or courses of action for an agency; or (3) brings about or obtains a result as to the adoption of general principles, plans or course of action for an agency. *See Department of the Navy, Automatic Data Processing Selection Office*, 7 FLPA 172, 177 (1981). The independent judgment exercised by the individual formulating or effectuating agency policies is critical in determining if a person is a management official. Individuals who serve on a board which sets agency policies may be management officials within the meaning of the Statute. *US Department of Justice, Board of Immigration Appeals*, 47 FLRA 505 (1993).

In those cases where an individual recommends policies or courses of action for an agency, the frequency of which the recommendations are adopted is important in determining if that person is a management official. To be a management official within the meaning of the Statute, the person in the position must be formulating policy or participating in the formulation of policy. A person who is responsible for effectuating the policy or who assists in the implementation of policy is not a management official.

Relevant information includes:

- 1) Documentation, such as organizational charts, of the Activity, locating the alleged management official.
- 2) Actual duties and responsibilities of the employee.
  - a) Obtain a copy of the position description and performance standards of the employee.
  - b) Given the nature of the work performed by a management official, obtain copies of any agency Regulations or directives which address the authorities and responsibilities of this position.
- 3) What decisions are made by the employee in the performance of the job? Obtain copies of policies, Regulations, directives, etc. issued by the employee.

- a) What is the scope of the authority of the employee (i.e., what types of decisions does s/he have authority to make).
  - b) What is the affect of any decision made and who is affected by the decision?
  - c) Are these decisions made pursuant to established policies or Regulations? If so, obtain copies of the relevant documents.
- 4) Do some or all of the decisions of the employee require higher agency approval?
  - a) The steps of the review process should be well-documented for the record. Obtain copies of policies, Regulations, directives, etc. written by the employee, that have been through this review process.
  - b) If the decisions must be approved by higher agency officials, how often are the decisions of the employee approved? How often are they disapproved?
- 5) Are the decisions of the employee subject to any type of review process?
  - a) The steps of the review process should be well-documented for the record. Copies of the employee's policies, Regulations, directives, etc. that have been through this review process should be entered into the record.
  - b) If the decisions or recommendations must be reviewed, how often are they accepted? How often are they rejected?
- 6) The employee actually may not be making policy, but may be making recommendations as to the formulation of policies. Obtain copies of recommended policies, Regulations, directives, etc. drafted and copies of the final policy, regulation, directive, etc. issued. Describe the employee's involvement in the making of policy.
  - a) The steps of the recommendation process should be well-documented for the record.
  - b) How often are the recommendations of the employee adopted? How often are they disapproved?
- 7) Does the employee attend supervisory or managerial meetings?
  - a) What is typically discussed at these meetings? How often are they held? Obtain minutes of these meetings, if possible.
  - b) How often does this employee attend these meetings?
  - c) What is the nature of the employee's participation at these meetings?
- 8) What is the employee's responsibility concerning the Agency's operations or policies? Obtain specific examples with documentation.

- 9) If the employee is not making policy determinations or making recommendations as to policies, what exactly, is the level of participation by the employee in formulating, developing, determining or influencing Agency policies. Obtain specific evidence concerning the exact nature of this participation.

Reference:

*U.S. Army Communications System Agency, Fort Monmouth, New Jersey*, 4 FLRA 627 (1980).

## 62 Supervisors

Section 7103(a)(10) of the Statute defines "supervisor" as:

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority.

Except as provided under section 7135(a)(2), a unit is not appropriate if it includes supervisors.

**Consistent exercise of judgment:** An individual is a supervisor if s/he **consistently** exercises **independent judgment** with regard to the supervisory indicia set forth in §7103(a)(10) of the Statute. *See Army and Air Force Exchange Service, Base Exchange*,

Fort Carson, Fort Carson, Colorado, 3 FLRA 596, 599 (1980).

**Supervision of "employees":** To be a supervisor within the meaning of the Statute, the person must be supervising an employee, as defined by the Statute. Thus, individuals who supervise military personnel are not supervisors within the meaning of the Statute, since they do not supervise employees. *Adjutant General of Michigan, Air National Guard, Battle Creek, Michigan*, 11 FLRA 66, 67 (1983).

**Number of employees:** There is no requirement that an individual must supervise a certain number of employees to be a supervisor under section 7103(a)(10). An individual who supervises one employee is a supervisor within the meaning of the Statute. *See Headquarters III Corps and Fort Hood, Fort Hood, Texas*, 13 FLRA 479 (1983).



**Number of supervisory indicia:** Not all supervisory functions must be exercised, for an individual to be deemed a supervisor. An individual who consistently exercises only one of the supervisor indicia is a supervisor within the meaning of the Statute. *See Department of the Air Force, Hanscom Air Force Base, Bedford Massachusetts*, 14 FLRA 266, 268 (1984).

**Joint performance of supervisory function:** Joint performance of a supervisory function is sufficient to qualify an individual as a supervisor, if independent judgment is exercised by the individual. *See Veterans Administration Medical Center Allen Park Michigan*, 35 FLRA 1206 (1990).

**Evaluation of employees:** Responsibility for independently evaluating employee performance is a basis for finding that an individual is a supervisor, where the evidence demonstrates that the evaluations are used when upper management makes decisions to hire, promote, reward or discipline employees. *See Department of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 45 FLRA 646 (1992).

**Use of secondary indicia:** In cases where the evidence does not conclusively establish that an individual exercises supervisory authority within the meaning of the Statute, certain "secondary indicia" of supervisory status will be considered. These secondary factors include: (1) attending meetings, including supervisory training sessions and (2) having the authority to grant time off to employees. *Department of the Interior, Bureau of Indian Affairs, Navajo Area Office*, 45 FLRA 646 at 654 (1992). The ability to approve or deny leave, without a showing of the exercise of any specific statutory supervisory authority, is not enough to demonstrate supervisory status. *Veterans Administration Medical Center, Allen Park, Michigan*, 34 FLRA 423, 426 (1990).

**Seasonal supervisors:** Individuals who exercise supervisory authority for a portion of the year and perform unit work for the remainder are "seasonal supervisors". They are excluded from the unit as supervisors during the period in which they are supervising employees, and included in the unit the remainder of the year. *U.S. Department of Agriculture, Forest Service, Intermountain Region, Challis National Forest*, 23 FLRA 349 (1981).

**Team leaders.** Determination of the supervisory status of team leaders rests upon the degree of independent judgment exercised by the team leaders. Team leaders are not supervisors if their responsibilities are routine in nature; if their function is to give technical advice to others, or if their work duties do not involve the consistent exercise of independent judgment. *See U.S. Department of the Treasury, Office of Chief Counsel*, 32 FLRA 1255, 1258-60 (1988). Team leaders who consistently exercise independent judgment in assigning work and directing and reviewing other employees' work are considered supervisors. *U.S. Department of the Army, Army Aviation Systems Command and Troop Support Command, St. Louis, Missouri*, 36 FLRA 587 (1990).

The following may be helpful in determining if an individual is a supervisor:

- 1) Documentation, such as organizational charts, of the activity, locating the work group involved and the general hierarchy of that portion of the activity.
- 2) Evidence and documentation as to the actual duties of the individual, focusing on the tasks that allegedly result in supervisory status.
  - a) Obtain copies of the position descriptions and performance standards of the individual and subordinates.
  - b) Documentation of the names of and positions held by subordinates
  - c) Describe the work done by the alleged subordinates.
  - d) Describe how the work performed by the alleged supervisor differs from or is similar to that of subordinates?
- 3) Describe the extent and nature of the individual's involvement in the hiring process.
  - a) Does the individual participate in the interviewing of applicants? How many times has s/he participated in interviews?
  - b) Does the individual make recommendations as to who should be hired? If so, how often are those recommendations adopted? How many times has the individual made such recommendations? When did this occur?
  - c) Does the individual act as the selecting official in hirings and promotions? How often does this occur? Obtain documentation of this.
- 4) Describe the extent and nature of this person's involvement in the assignment of work.
  - a) Does the individual distribute work? Is this distribution of work based upon written guidelines?
  - b) Does individual reassign work? The process by which work is reassigned should be explored in detail.
  - c) How is this individual involved in determining the number of employees to be used on which projects?
  - d) Does individual distribute work in accordance with his/her evaluation of the capabilities of employees.
  - e) How are overtime assignments made?
  - f) Does the individual schedule or prioritize work?

- g) Does the individual maintain records of employee performance?
  - h) To what extent is the individual responsible for the completion and quality of the work from the work group?
  - i) To what extent must the individual rely on instructions from others or on standard operating procedures in assigning work?
  - j) Does the individual instruct employees on how to perform the work?
  - k) Does this individual have the authority to approve leave?
  - l) Has this individual denied a leave request or absence from the job, on the basis of workload requirements?
- 5) How does this individual become involved in the detail, transfer or reassignment of employees within the activity?
- a) Has this person recommended the detail, transfer or reassignment of any employee(s)?
  - b) If so, how many of the recommendations were followed? How many were not?
  - c) Does this person have the authority to detail, transfer or reassign employees within the activity? If so, using specific examples, describe his/her role in the process.
- 6) Does this person have the authority to suspend, discipline or remove employees?
- a) Has this person counseled, disciplined or removed any employees?
  - b) Has this person recommended that an employee be counseled, reprimanded, suspended or removed? Describe how that recommendation was processed and whether the employee was disciplined in any way.
  - c) Have grievances under the negotiated grievance procedure been filed, challenging this disciplinary action?
- 7) Is this individual involved in the performance appraisal process?
- a) Does this individual complete annual performance appraisals for employees? Obtain copies of the appraisals.
  - b) How are these evaluations used in promotion actions, the granting of awards, reemployment decisions?

- c) Does this individual have the authority to promote employees? To recommend their promotion? How often are his/her recommendations followed?
- 10) Does the individual participate in or determine when and which employees will be furloughed, reduced in force or recalled?
- 11) How is this individual involved in the grievance process?
- a) Have any actions taken by the individual been the subject of a grievance? Using such a grievance, information should be developed as to the involvement of the individual in the grievance process.
  - b) Have any recommendations made by the individual been the subject of a grievance? Using such a grievance, information should be developed as to the involvement of the individual in the grievance process.
  - c) Has this individual adjusted any grievances? Examples of such adjustments should be developed.
- 12) What is the involvement of this person in other matters, which might shed light on supervisory authority.
- a) In connection with this position, has this person attended supervisory training? Is such training a prerequisite for the position?
  - b) Does this person attend supervisory or management meetings? These meetings should be described in detail, covering how often they are conducted, who attends and what transpires at these meetings.
  - c) Does this person have the authority to approve or deny leave? Are there any minimum staffing guidelines that the person must follow when considering if leave should be approved?

References:

*Department of Energy, Oak Ridge Operations, Oak Ridge, Tennessee, 4 FLRA 644, 651-52 (1980).*

U. S. Office of Personnel Management  
Labor-Management Relations Advisory 98-1

April 1, 1998

SUBJECT: Bargaining Unit Status of Team Leaders

Disagreement over the bargaining unit status of team leaders is partly due to the fact that (i) the duties associated with team leader positions aren't uniform, and (ii) the supervisors who once occupied the eliminated supervisory positions often have been selected to fill the newly-created team leader positions. There is a wide range of duties and responsibilities associated with team leader positions, some of which may overlap with typical supervisory functions. The bargaining unit status of each team leader position can be evaluated by applying the guidance provided by the Federal Labor Relations Authority (FLRA) in several of its decisions, some of which are summarized below. FLRA decisions on the bargaining unit status of team leaders have thus far focused on whether or not the team leader consistently exercises independent judgment with regard to any of the supervisory duties listed in title 5, United States Code, section 7103(a)(10), and whether or not the team leader is a confidential employee within the meaning of section 7103(a)(13) of the Statute.

#### Supervisory Status Argument

In the majority of FLRA rulings, the determination of bargaining unit status for those in team leader positions hinges on whether or not the employee is one who consistently exercises independent judgment with regard to any of the supervisory duties listed in section 7103(a)(10), which reads as follows:

"[S]upervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which included firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority.

#### Principal test for supervisors.

In Puget Sound Naval Shipyard, 7 FLRA 526, 527, the FLRA said the following: "Under the definition's principal test for supervisors, an individual need only exercise one of the definition's enumerated criteria in a way that requires the consistent exercise of independent judgment to be deemed a supervisor" (Emphasis added.)

The FLRA has made several important distinctions in determining whether a team leader is also a supervisor. They are as follows:

No consistent exercise of independent judgment. Team leaders with responsibility for assigning work and directing employees are not supervisors where the exercise of such responsibility is routine in nature and does not involve the consistent exercise of independent judgment. U.S. Naval Station, Panama, 7 FLRA 489, 492. See also, Army Aviation Systems Command, 36 FLRA 587, 592 (which contains a very helpful summary of previous decisions on the supervisory status of team leaders) and Army Communications and Electronics Materiel Command, 9 FLRA 101.

Technical review of team's work. Team leaders who review the work of other employees from only a technical standpoint are not supervisors because the review function is routine and does not require the exercise of independent judgment. See Department of the Treasury, Office of Chief Counsel, 32 FLRA 1255, 1258-60; Dugway Proving Ground, Dugway, Utah, 8 FLRA 684, 686-87; and Materiel Readiness Support Activity, Lexington, Kentucky, 8 FLRA 46.

Consistent exercise of independent judgment. However, in Army Aviation Systems Command, 36 FLRA 587, 593, the Authority found employees to be supervisors where it was shown that they consistently exercised independent judgment in directing or reviewing other employees' work. See Bureau of Prisons, Lewisburg, 7 FLRA 126, 132-33; Department of Energy 4 FLRA 644, 651-52; Army and Air Force Exchange Service, 3 FLRA 596 at 601.

#### Confidential Employee Argument

In addition to the "supervisory status" argument, the Regional Director of the Authority's Washington Regional Office included a second reason in explaining the exclusion of team leaders from a bargaining unit. In this case, the Regional Director also found the team leaders to be confidential employees within the meaning of title 5 United State Code section 7103(a)(13) and 7112(b)(2) as they had "been placed in a confidential relationship with individuals who formulate or effectuate management policies in the field of labor-management relations" SSA and AFGE, Case No. WA-RP-60063.

#### Conclusion

The determination of the bargaining unit status of those in team leader positions largely remains a function of the circumstances and duties surrounding each position. In other words, the determination is made on a case-by-case basis and takes into consideration the unique and varied nature of the responsibilities of team leaders and

applies the above criteria to the facts of each case.

Any questions or comments on material on this page are to be directed to the U.S. Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., Washington, DC, 20415-2000, telephone (202) 606-2930; fax (202) 606-2613; or email [lmr@opm.gov](mailto:lmr@opm.gov).